premium was revised to $12,566,000. It is clear from Natwest's solicitors' letter of June 11, 1981, to the Commissioner (WPP 11) when accepting the revised terms and conditions that the solicitors were aware that the State land had not been alienated on October 9, 1980, as the letter stated: "Our clients understood that the revised premium is for the 20-storey bank/office building to be constructed on the land and as such, no development and/or rezoning charges would be paid in respect of *the land to be alienated* to our clients." The Certificate of Title dated March 22, 1983, (Ex A attached to the affidavit of Andrew Tan Kim Guan) shows beyond doubt that the Yellow Parcel was not alienated on October 9, 1980, as contended by the defendants. October 9, 1980, is the date of commencement of the 99-year lease.

There is no basis for the defendants to resist the plaintiffs' claim. The plaintiffs purchased the Company Natwest for $50 million. Why should the plaintiffs pay for the defendants any part of the purchase price for the Yellow Parcel? The premium is the purchase price and the defendants are obliged to pay it. The additional premium and additional stamp duty are clearly contingent liabilities that were in existence at the time of the said Option and come within the scope of the warranties which the plaintiffs rely.

There will be an order in terms of prayers 1, 2 and 3 of the Originating Summons, with interest at the rate of 15½% per annum (which is the rate of interest provided for in the Agreement in the event that the plaintiffs or the defendants were in default under Clause 4, and Clause 7(b) and (c)). The defendants are also to pay costs on solicitor and client basis.

Order accordingly.

Solicitors: *Donaldson & Burkinshaw; Y.H. Cheong.*

A MALAYSIAN REPORTS

TUN DATUK HAJI MOHAMED ADNAN ROBERT v. TUN DATU HAJI MUSTAPHA BIN DATU HARUN; DATUK JOSEPH PAIRIN KITINGAN v. TUN DATU HAJI MUSTAPHA BIN DATU HARUN

B [S.C. (Abdul Hamid C.J. (Malaya), Hashim Yeop A. Sani & Abdoolcader S.C. JJ.) October 21, 1985]

[Kuala Lumpur – Supreme Court Civil Appeals Nos. 274 and 271 of 1985]

C *Constitutional Law – Appointment of Chief Minister – Application for declaration that appointment of plaintiff as Chief Minister valid and that subsequent revocation of appointment and appointment of 2nd defendant as Chief Minister ultra vires and therefore null and void – Preliminary objection – Justiciability – Political issue – Whether privilege of State Legislative Assembly involved – Federal Constitution, art. 72 – Sabah Constitution, art. 6(3).*

D *Jurisdiction – Whether principle of forum non conveniens applies – Whether respondent's action justiciable.*

The respondent in these cases had applied to the court for declarations that his appointment as Chief Minister of Sabah by the first appellant was valid and that the subsequent revocation of his appointment and the appointment of Datuk Joseph Pairin Kitingan (the 2nd appellant) as Chief E Minister were *ultra vires* and therefore null and void. The appellants had raised a preliminary objection that the court had no jurisdiction to hear the action and grant the declaratory reliefs sought. The High Court overruled the objection and the appellants appealed.

F **Held:** justiciable issues do in fact arise for judicial determination in this case and the matter falls within the jurisdiction of the court for adjudication.

Cases referred to:

(1) *Republic of Bolivia* v. *Bolivian Navigation Company* (1876) 24 W.R. 361; [1876] W.N. 77.
(2) *Stephen Kalong Ningkan* v. *Government of Malaysia* [1968] 1 M.L.J. 119.
G (3) *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg & Tawi Sli* [1966] 2 M.L.J. 187.
(4) *Fan Yew Teng* v. *Government of Malaysia* [1976] 2 M.L.J. 262.
(5) *Dato Menteri Othman bin Baginda & Anor.* v. *Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 M.L.J. 29.
H (6) *Merdeka University Berhad* v. *Government of Malaysia* [1981] 2 M.L.J. 356.
(7) *Malone* v. *Metropolitan Police Commissioner* [1979] 1 Ch. 344.
(8) *Madan Murari* v. *Choudhuri Charan Singh* A.I.R. 1980 Cal. 95.
I (9) *Dinesh Chandra Pande* v. *Chaudhury Charan Singh & Ors.* A.I.R. 1980 Delhi 114.
(10) *Jogendra Nath Hazarika* v. *State of Assam* A.I.R. Gauhati 1982, 25.
(11) *Bradlaugh* v. *Gossett* (1884) 12 Q.B.D. 271.
(12) *The King* v. *Sir R.F. Graham-Campbell & Ors.* [1935] 1 K.B. 594.
(13) *Republic of Italy* v. *Hambros Bank* [1950] Ch. 314.

(14) *Howard* v. *Pickford Tool Co. Ltd.* [1951] 1 K.B. 417.
(15) *C. Shrikishen* v. *State of Hyderabad* A.I.R. 1956 Hyd. 186.
(16) *Har Sharan* v. *Chandra Bhan Gupta & Ors.* A.I.R. 1962 All. 301.
(17) *Council of Civil Service Unions & Ors.* v. *Minister for the Civil Service* [1984] 3 All E.R. 935.
(18) *R.K. Nokulsana Singh* v. *Rishang Keising* A.I.R. 1981 Gauhati 47.
(19) *Glasgow Navigation Co.* v. *Iron Ore Company* [1910] A.C. 293.
(20) *Tindall* v. *Wright* (1922) 38 T.L.R. 521.

HIGH COURT (Kota Kinabalu – Suit No. K. 467 of 1985, August 5, 6, 7 & 29, 1985).

Raymond Kidwell Q.C. (*Sri Ram and Abdul Razak Rouse* with him) for the plaintiff.

Dominic Puthucheary (*Datuk Herman Luping* with him) for the 1st defendant.

Dominic Puthucheary (*Joannes Golokin* with him) for the 2nd defendant.

Cur. Adv. Vult.

Tan Chiaw Thong J.: The defendants through their learned senior counsel have raised a preliminary objection that the Court has no jurisdiction to hear this action and grant the reliefs sought by the plaintiff.

The grounds for the objection are as follows:

1. That the issues raised by the plaintiff are not justiciable issues.

2. That this Court is not the right forum for hearing the plaintiff's complaint, and that the principle of *forum non conveniens* applies.

3. That the declarations and injunction sought in the Statement of Claim are not issues on which this Court will grant declaratory orders or injunctions.

4. That the appointment of the Chief Minister is for the Yang Di Pertua Negeri and subsequent to such appointment, the position of the Chief Minister is a privilege of the Legislative Assembly, and this privilege has been exercised by the Legislative Assembly by a vote of confidence on May 30, 1985. Subsequent to that, on August 3, 1985, matters in relation to the appointment of the Chief Minister had been decided by the Legislative Assembly and therefore the court should take cognizance of those and decline jurisdiction as a matter of principle.

5. That the jurisdiction of this Court to decide on issues raised is ousted as a result of the resolutions of May 30, 1985 and August 3, 1985 by Article 72 of the Federal Constitution.

6. That the principle of parliamentary democracy enshrined in the Federal and Sabah State Constitutions is based on the separation of powers and therefore this Court should avoid any enquiry directly or indirectly which might lead to a conflict with the Legislative Assembly.

7. That the issues raised in the Statement of Claim are now *ex post facto* and no longer issues that can be justiciable.

Learned senior counsel for the plaintiff has contended otherwise.

The pleadings disclose that there are issues of fact and law. The Court has to decide whether, considered in the light of arguments of learned counsel for the parties, such issues are justiciable and it is within the jurisdiction of the Court to try them.

The following facts are not in dispute:

(a) The plaintiff on April 22, 1985 following the holding of a general election for the Legislative Assembly of the State of Sabah, took an oath before the 1st defendant in the form prescribed for an oath to be subscribed by the Chief Minister of Sabah, as a member of the State Cabinet.

(b) The results of the general election are that Parti Bersatu Sabah (PBS) headed by the 2nd defendant secured 25 seats to which was subsequently added one more seat won by Ignatius Malanjum, making 26 seats; United Sabah National Organisation (USNO) led by the plaintiff 16 seats; and Parti Berjaya 6 seats. The number of elected seats is 48 seats.

At the outset, I would deal with one matter. It was submitted by learned senior counsel for the plaintiff that, on a preliminary matter, the Court should proceed on the basis that the facts alleged by the plaintiff are, or are deemed to be, correct. This contention was challenged by learned senior counsel for the defendants, who argued that it was unnecessary for the Court to make findings of fact on relevant issues in considering the matters comprised in the grounds of objection. In this connection, it is to be observed that only such

questions of law can properly be raised as preliminary issues as must necessarily arise in the action: see *Republic of Bolivia* v. *Bolivian Navigation Company.*[1] In this respect, it need hardly be mentioned that some issues of law concerned in this action may possibly arise as a result of issues of fact raised. Accordingly, I shall adopt the same approach as in the *Republic of Bolivia's* case (*supra*).

The first ground of objection is that the issues raised by the plaintiff are not justiciable issues. In this connection, learned senior counsel for the defendants has not specified what these issues are, but they must necessarily be issues raised by the pleadings. In this connection, consideration of the pleadings would appear to indicate that the main legal issues that would necessarily arise in the action would include the following:

(a) The issue regarding the alleged appointment of the plaintiff as Chief Minister. This would include a finding whether, in law, the plaintiff was appointed which, in turn, would involve consideration of the issue relating to the circumstances regarding the taking of the oath by the plaintiff.

(b) The issue relating to what was alleged by the plaintiff as his dismissal by the 1st defendant, including the issue whether the latter has any power of dismissal.

(c) The issue regarding the appointment of the 2nd defendant as Chief Minister, which is related to the first two issues.

(d) The issue as to whether the discretionary power of appointment of the 1st defendant is subjective or objective in nature.

(e) The issues of conspiracy, misrepresentation, fraud and duress raised by the defence in connection with the plaintiff's claim of appointment.

(f) The issue as to whether an instrument of appointment is necessary to render an appointment of the Chief Minister legally effective.

This list is not exhaustive, but is an indication as to what are included in the main issues.

Learned senior counsel for the plaintiff has submitted that, in connection with the preliminary objection, the appointment of the plaintiff should not be an issue to be considered as this is not raised in the Statement of Claim. However, learned senior counsel for the defendants has stressed that this issue is central to the case for the defendants, for if there is no appointment, no question of any dismissal of the plaintiff would arise. In this connection, as stated and for the reason given, I proceed on the basis that the issue of the alleged appointment of the plaintiff is an issue which, on the pleadings, would necessarily arise in the action and thus form a matter of consideration in relation to, in particular, this ground of objection. In connection with this ground, learned senior counsel for the defendants has submitted that, as the Statement of Claim has raised the issues of how the 1st defendant appointed, or had not appointed the Chief Minister, this would require him, as Head of State, to give evidence as to the state of his mind, or whether he had acted in good faith, or had been influenced by extraneous matters. This would lead to an unseemly state of affairs, as he would be examined on his powers and how he exercised them, especially on matters touching on his personal capacity on matters of State. Hence, the Court will be called upon to decide on the credibility and state of mind of the Head of State, and whether he had acted in good faith on matters raised in the defence. It was submitted that these are not justiciable issues, in the same manner that His Majesty the Yang di-Pertuan Agong's action in making a Proclamation of Emergency is not justiciable. Further, to say that such matters are justiciable is to open the floodgates to every official act of the Head of State being questioned; and this would reduce his high status, and also reduce his status to that of an ordinary citizen. In this connection, the case of *Stephen Kalong Ningkan* v. *Government of Malaysia*[2] was cited. Part of the headnote reads:

"In his second action in the High Court at Kuching the petitioner claimed (a) that the proclamation of a State of Emergency, being made on the advice of the Federal Cabinet, was null and void in that it was not made *bona fide* but in *fraudem legis*, and (b) that the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966, was on that account null and void. On December 2, 1966 Pike C.J. (Borneo) holding *inter alia* that an action to declare a Federal law invalid required leave of a judge of the Federal Court before commencement of proceedings, by virtue of Article 4 of the Federal Constitution, ordered certain paragraphs in the statement of claim struck out [1967] 1 M.L.J. 46. On February 20, 1967 leave was given by the Lord President for institution of proceedings against the Government of the Federation of Malaysia for a declaration that the said Act was invalid and/or that sections 3, 4 and 5 thereof were invalid as being *ultra vires* the Federal Government. In his petition the petitioner alleged that no grave Emergency had arisen in the State of Sarawak which

could not be effectively dealt with under the previous proclamation of emergency made on September 7, 1964, that the Federal Cabinet well knew that no such emergency existed "whereby the security or economic life of Sarawak was threatened"; that the proclamation was *in fraudem legis* in that it was made not to deal with grave emergency whereby the security or economic life of Sarawak was threatened but for the purpose of removing the petitioner from his lawful position as Chief Minister of Sarawak, and that the amendment of clauses (5) and (6) of Article 150 of the Federal Constitution were null and void as *ultra vires* the Parliament and contrary, not only to article 150 and Article 161E(2) of the Federal Constitution, but also the entrenched provisions in Article 41 of the Sarawak Constitution and relevant provisions in the Malaysia Act, 1963."

In that case, it was held by the Federal Court, by a majority, *inter alia*, that (1) it is incumbent on the Court to assume that the Government was acting in the best interests of the State and to permit no evidence to be adduced otherwise; (2) the circumstances which bring about a state of emergency are non-justiciable. In his judgment, Barakbah L.P. stated (at page 122):

"In my view the question is whether a Court of Law could make it an issue for the purpose of a trial by calling in evidence to show whether or not His Majesty the Yang di-Pertuan Agong was acting in bad faith in having proclaimed the emergency. In an act of the nature of a Proclamation of Emergency, issued in accordance with the Constitution, in my opinion, it is incumbent on the Court to assume that the Government is acting in the best interest of the State and to permit no evidence to be adduced otherwise. In short, the circumstances which bring about a Proclamation of Emergency are non justiciable."

The following passage appears in the judgment at the same page:

"In my opinion the Yang di-Pertuan Agong is the sole judge and once His Majesty is satisfied that a state of emergency exists it is not for the Court to inquire as to whether or not he should have been satisfied."

It was submitted that just as the action of the Yang di-Pertuan Agong in making a proclamation of an emergency is of such importance and central to the security of the country that it is not justiciable; so the appointment of a Chief Minister here is so central and vital to the political life of the State that it should not be justiciable. It was also emphasized that hence the matter of the exercise of the discretionary power of the 1st defendant as Head of State in the appointment of a Chief Minister should not be justiciable.

Learned senior counsel for the plaintiff has contended that this is not a case where the Court cannot constitutionally interfere in respect of the matters complained of by the plaintiff, as in the *Stephen Kalong Ningkan's* case (*supra*). It was emphasized that, as far as the plaintiff was concerned, his case is based on what he contends is unlawful dismissal, with all the attendant consequences, as reflected in the reliefs sought; and on the question of dismissal, this does not involve the exercise of discretion of the 1st defendant as Head of State, since this is a constitutional and legal issue which has been adjudicated upon in the case of *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg & Tawi Sli*[3] without objection and hence this Court has jurisdiction to try such an issue. In this connection, I had earlier listed out, among the main issues to be tried in this action, that relating to the alleged dismissal of the plaintiff as Chief Minister. In my view, the issue of dismissal and the applicability of the *Stephen Kalong Ningkan's* case (1966) (*supra*) and alleged legal power of dismissal as pleaded in the defence are issues that are legal and constitutional in nature, and are therefore, in my opinion, issues that are justiciable and within the jurisdiction of the Court to try them.

As to the issue of appointment, an important point to consider, in my view, is whether the issues to be tried include any issue giving rise to an examination as to how the 1st defendant had exercised his discretion on the matter of an appointment of the Chief Minister, and the factors he took into consideration in exercising such a discretion. If such an issue is involved, then, on the authorities, including that of the *Stephen Kalong Ningkan's* case (1968) (*supra*), it would appear that such an issue is not justiciable and the Court has no jurisdiction to try it. Indeed, this is conceded by learned senior counsel for the plaintiff. However, in my view, the issue regarding the alleged appointment of the plaintiff as Chief Minister does not appear to be one of such a nature as has just been mentioned. The plaintiff alleges that he has been lawfully and constitutionally appointed, but this is denied by the defendants who contend that there was no appointment on the grounds that no instrument of appointment had been given and because the oath of office subscribed by the plaintiff resulted from conspiracy, misrepresentation, fraud and duress and hence any appointment is null and void, and can be annulled, rescinded, rectified, revoked, and dismissal can lawfully be made. Hence, in my opinion, the issues on appointment are not those regarding whether the discretion of the 1st defendant as the Head of State has been exercised lawfully and constitutionally; or what factors the 1st defendant took, or should take, into account in exercising his discretion on the appointment of the Chief Minister. Rather,

they are issues as to whether there was in law an appointment, and this is related to the issues regarding the validity of the oath taken by the plaintiff; and whether the taking of an oath implies appointment. Hence, in my opinion, for the purposes of these proceedings, the principles established by the *Stephen Kalong Ningkan's* case (1968) (*supra*) are inapplicable to the issue of appointment here. Accordingly, I am of the view, and rule, that, on the pleadings, the issue of appointment is justiciable and the Court has jurisdiction to try this issue.

I have not lost sight of the inevitability of the 1st defendant as Head of State having to give evidence during the course of the trial on the issue of appointment. It is a matter of regret that this has to occur, but in the circumstances, unpleasant though the matter is, there appears to be no alternative but to face it. The first ground of objection, therefore, fails.

The second ground of objection is that this Court is not the right forum for hearing the plaintiff's complaint, and that the principle of *forum non conveniens* applies. It was emphasized that the issue of who should be appointed the Chief Minister and enjoy the confidence of the Legislative Assembly (LA) is a political one, and that the proper forum to decide this is the LA; and that this issue could have been finally and decisively decided by the LA at its meetings held on May 30, and August 3, 1985; but the plaintiff and his followers chose to boycott these meetings. At this juncture, I would say a word about the resolution (Ex. DI) passed by the LA at its meeting on August 3, 1985. As rightly observed by learned senior counsel for the plaintiff, this resolution does not form a subject-matter of the defence as yet, but arguments on it had been made by both parties. No doubt, procedurally, the matter would be put on a proper footing in due course.

In support of the second ground, learned senior counsel for the defendants has cited three authorities. I shall deal with them in turn.

The first authority is the case of *Fan Yew Teng* v. *Government of Malaysia*[4] and it was contended on that authority, that once a LA has dealt with a matter, in this case the matter of the appointment of the Chief Minister and who in that capacity commands the confidence of the majority of members, the Court should not interfere directly or indirectly, in the same matter. With respect, as a proposition, this is my view is obviously too wide, as the authority of the LA must necessarily be confined to matters within its constitutional and legal powers and functions. It is pertinent to observe that it is quite clear, under the Constitution of the State of Sabah (the State Constitution), the authority and function of the appointment of the Chief Minister after a general election are vested in the Head of State who, in performing that function, must appoint as Chief Minister a member of the LA who in his judgment is likely to command the confidence of a majority of the members of the LA (Article 6(3) of the State Constitution). I have not lost sight of the issue relating to the expression "majority of the members of the Assembly," but in my view, this is not a relevant issue in these proceedings. Under the State Constitution, whether the choice of the Chief Minister is the correct one can be tested in the LA which, if that august body disagrees with such choice, is at liberty to pass a motion of no confidence in the Chief Minister as appointed by the Head of State. Accordingly, in my view, in this respect, the authority and functions of the Head of State and those of the LA, as conferred by the State Constitution, are separate and distinct. In my opinion, under the State Constitution, it is no part of the authority and function of the LA to appoint the Chief Minister, which falls exclusively within the powers and function of the Head of State. If, subsequently, a vote of no confidence is passed by the LA against the appointee, then it is open to him to either advise the Head of State to dissolve the LA and call for a fresh general election; or to tender his resignation to the latter (see Articles 7(2) and 10(2)(b) of the State Constitution), although the Head of State has discretionary power to withhold consent to a dissolution.

The headnote in the *Fan Yew Teng's* case (*supra*) reads:

"The plaintiff applied for various declarations arising out of his conviction for sedition and a fine of $2,000.00 imposed on him in the High Court [1975] 1 M.L.J. 176. A motion had been introduced into the Dewan Ra'ayat that the question whether the plaintiff has become disqualified for membership of the House be referred to the Committee of Privileges. The plaintiff sought declarations in effect that he had a right to exhaust his legal right of appeal and to petition the Yang di-Pertuan Agong for a pardon before the Dewan Ra'ayat could take a decision in his disqualification; and that it was only the Dewan Ra'ayat and not the Committee of Privileges which could go into the question of his disqualification.

Held: (1) the decision on the issue of disqualification is for the Dewan Ra'ayat to take and when taken it is final and cannot be questioned in any Court;

(2) the Court cannot interfere with the right of the Dewan Ra'ayat to decide the question of the plaintiff being disqualified from membership and the reliefs sought by the plaintiff are outside the jurisdiction of the Court;

(3) the Government of Malaysia cannot be a proper defendant from whom the reliefs sought, even if available, could be made, and therefore the Government was not a necessary party to the proceedings."

That case concerns the question whether the plaintiff has become disqualified for membership of the Dewan Ra'ayat, and in this connection, Articles 53 and 63 of the Federal Constitution provide as follows:

"Article 53. Decisions as to disqualification

If any question arises whether a member of a House of Parliament has become disqualified for membership, the decision of that House shall be taken and shall be final:

Provided that this Article shall not be taken to prevent the practice of the House postponing a decision in order to allow for the taking or determination of any proceedings that may affect the decision (including proceedings for the removal of the disqualification).

Article 63. Privileges of Parliament

(1) The validity of any proceedings in either House of Parliament or any committee thereof shall not be questioned in any Court.

(2) No person shall be liable to any proceedings in any Court in respect of anything said or any vote given by him when taking part in any proceedings of either House of Parliament or any committee thereof."

In his judgment, Chang Min Tat J. said (at page 266):-

"The issue in his application is the right of the Plaintiff to sit in the Dewan Ra'ayat and, in my view and with respect, this issue comes fully within the compass of Article 53 and Article 63. The issue therefore involves the proper and reasonable construction of these Articles. The language is plain and unambiguous. Giving the words therein their plain and grammatical meaning, the decision on this issue is for the House to take, it is final when taken and the validity of the proceedings cannot be questioned in any Court. These Articles can admit of no other construction."

Thus, in that case, it was held that the Court had no jurisdiction to adjudicate upon the matters raised by the plaintiff, because they fell within the exclusive jurisdiction of the Dewan Ra'ayat. In my view, for the reasons already given, the matter of the appointment and, for that matter, the dismissal, of the Chief Minister, does not fall within the jurisdiction of the LA to decide. Hence, the *Fan Yew Teng's* case is of no assistance to the defendants.

The next case is that of *Dato Menteri Othman bin Baginda & Anor.* v. *Dato Ombi Syed Alwi bin Syed Idrus*[5], the relevant part of the headnote of which reads:—

"In this case the respondent had applied for a declaration that the purported appointment by the first appellant of the second appellant as the new Undang of Jelebu was contrary to the adat, custom and constitution of the luak of Jelebu. The appellants after filing their defence applied for an order that the statement of claim be struck out on the ground that the Court had no jurisdiction because the dispute involved a question of adat and custom of the Malays in the luak and on the further ground in the case of the second defendant that under the Constitution of Negri Sembilan he as Ruling Chief enjoyed legal immunity in his personal capacity. The learned trial judge dismissed the application of the appellants, holding that the Court had jurisdiction to entertain the action and that the second defendant did not enjoy legal immunity. The appellant appealed.

Held, by a majority (Suffian L.P. dissenting): (1) the Dewan Keadilan dan Undang is given power under the Constitution to advise on matters relating to Malay custom and as the Dewan in this case had blessed the appointment of the second defendant as the Undang of Jelebu, the Court should not attempt to usurp the function of the Dewan, which is a more suitable *forum* for discharging that function;

(2) the Court should decline jurisdiction on the ground that it is *forum non conveniens* and that there is another body which is more appropriate and which has been given power under the Constitution of the State to decide the matter."

It was submitted that the LA is the more appropriate *forum* to decide as to who should be the Chief Minister because, at one sitting, a decisive decision can be made to the dispute here once and for all. It was argued that judicial procedure and the Court are not the proper procedure and *forum* to make such a decision; further, that it is inappropriate for the Court to decide on a political issue, which the appointment of the Chief Minister is. It was also contended that such a political issue as is concerned in this case should be decided by the LA, which is the proper forum to make such a decision. In the *Dato Menteri Othman's* case (*supra*), the Federal Court, by a majority, held, *inter alia*, that it should decline jurisdiction to decide the matter in issue on the ground that it was *forum non conveniens* and there was another body which is more appropriate and which has been given power under the Constitution of the State of Negeri Sembilan to decide such matter.

In my view, on the matter as to whether the Court is the proper *forum* to try and decide on the issues raised by the pleadings or whether it is *forum non conveniens*, let me say at once that the

confidence of the LA in any appointee of the Head of State as Chief Minister forms no part of the issues in this action, which, basically but not exhaustively, include the issues regarding appointment and dismissal, with other related issues. Hence, the situation here is not similar to that which existed in the *Dato Menteri Othman's* case (*supra*). I have given reasons as to why I considered that the issues of appointment and dismissal are justiciable issues and hence fall within the jurisdiction of the Court to try. Attention has been drawn to passages in the *Dato Menteri Othman's* case (*supra*) regarding principles relevant to the construction; but here, the construction of the State Constitution in particular, falls within the jurisdiction and function of the Court.

As to whether the issues mentioned are political in nature, one would be naive, in my view, not to regard them as partly political, but, in my opinion, they are not wholly political in nature. Their trial and decision thereon, in my view, would involve construction of the Federal and State Constitutions, and consideration of legal principles; and the legal issues of misrepresentation, conspiracy, fraud and duress, all of which fall within the jurisdiction and function of the Court. Hence, I do not consider that the decision in the *Dato Menteri Othman's* case (*supra*) applies here.

The third case cited in connection with the second ground is that of *Merdeka University Berhad* v. *Government of Malaysia*.[6] The facts as appear in the headnote read:

"The plaintiff, a company limited by guarantee, submitted a petition to the Yang di-Pertuan Agong for an incorporation order for Merdeka University under section 6 of the Universities and University Colleges Act, 1971. The petition was rejected and the Minister of Education announced that the rejection of the plaintiff's petition was for the following reasons: (a) Merdeka University would use Chinese as the medium of instruction; (b) it is meant to cater for students from Chinese independent secondary schools; (c) it is to be set up by the private sector; and as a composite for the basis of rejection that in effect its establishment would be contrary to the national education policy. The plaintiff requested a dialogue with the Minister but there was no response. The plaintiff issued a writ asking for a declaration that the rejection of the petition for the establishment of Merdeka University is null and void as it contravenes the Federal Constitution and for a declaration that the refusal of the petition to establish the University is an unreasonable and improper exercise of the discretion conferred by section 6 of the Universities and University Colleges Act, 1971."

It was held, *inter alia*, that:

"(10) the point taken by the plaintiff that the reasons for the rejection of the petition are incompatible with Article 26 of the Universal Declaration of Human Rights does not arise in this case and in any event the pertinent provisions for consideration are those contained in municipal legislation. The Court's power to make declarations is confined to matters justiciable in the Courts and limited to legal and equitable rights and does not extend to moral, social or political matters;"

I do not consider that this case assists the defendants, as the main issues of appointment and dismissal and the other issues mentioned in the foregoing paragraphs are, in my view, legal matters, although, in the circumstances, some of them may smack of political flavour, but this factor alone, in my view, does not have the effect of ousting the jurisdiction of the Court. In the premises, the second ground of objection fails.

The third ground of objection is that the declarations and injunction sought in the Statement of Claim are not issues on which this Court will grant declaratory orders or injunctions.

At the outset, it is to be observed that, with the exception of reliefs (h) (costs of this suit), and (i) (further or other relief), reliefs (c) to (g) are dependant upon, and will necessarily follow, a decision as to whether (1) it falls within the power of the Court to grant and (2) whether the Court should grant reliefs (a) and (b) sought by the plaintiff. Reliefs (a) and (b) are as follows:

"(a) a declaration that the 1st defendant's revocation of the plaintiff's appointment as Chief Minister on the 22nd day of April, 1985 is *ultra vires* the Constitution, null and void and of no effect;

(b) a declaration that the plaintiff is the Chief Minister of the State of Sabah;"

It was emphasized that it ultimately falls within the jurisdiction of the LA to decide who should be the Chief Minister and who, as such, commands the confidence of the majority of members thereof and that the most that the plaintiff could hope for is a reasoned judgment of the Court as to who has the confidence of the LA. Further, that what is involved here is a political, as distinct from a legal, right.

On the other hand, learned senior counsel for the plaintiff has pointed out that the trend of the Courts is towards a more liberal attitude regarding judicial review of executive actions and the grant of declaratory orders; that a contrast should be made between a legal right and political issues; and that here, the former matter, and not the latter, is in issue, in respect of which the plaintiff is entitled to come to Court to have it tried.

On the factor of power to make declaratory orders, it is established that under Order 15 rule 6 of the Rules of the High Court, 1980 the Court's power to make declaratory judgments or orders is confined to matters which are justiciable, and the binding declarations which the Court can make under the rule are declarations as to legal or equitable rights and not moral, social or political matters: see *Malone* v. *Metropolitan Police Commissioner*;[7] *Merdeka University Bhd.* v. *Government of Malaysia* (*supra*).

I have earlier expressed the view that the issues, although they may be said to be partly political in nature, nevertheless involve consideration of interpretation of the Federal and State Constitutions and that the main issues are legal ones both of which factors fall within the jurisdiction and function of the Court to deal with. On the issue of appointment which was stated to be a central feature in the case for the defence, subject to it being tried, if the Court finds that the contention of the plaintiff succeeds, this would mean that a legal right is involved; and it is not, in my view, incompetent for the plaintiff to ask for the first two reliefs sought. Hence, with respect, I am unable to accept the argument that political issues and no legal right are involved in this respect.

It is true that, ultimately, it is the LA who has the power to decide who commands its confidence and hence who should continue to be Chief Minister, but, as pointed out earlier, this is not the issue here, and the main issues relate to appointment and dismissal which, for the reasons given, are justiciable issues. In my view, the facts and reliefs sought in the *Malone's* case (*supra*) are different and distinguishable. There, it was held *inter alia* that some of the declarations sought by the plaintiff did not relate to legal or equitable rights and hence the Court had no power to make them; and with regard to some others, that the Court in its discretion would not make them.

Three Indian cases were cited in support of the third ground. In considering these cases, it should be borne in mind that the relevant constitutional provisions construed by the Indian Courts in those cases are not identical to ours, although they may relate to the same subject-matter.

The case of *Madan Murari* v. *Choudhuri Charan Singh*[8] was concerned with, *inter alia*, the construction of Articles 74 and 75 of the Indian Constitution. Article 74 is not relevant here, while Article 75 relates to the appointment of the Prime Minister and other Ministers by the President of India, the collective responsibility of the Council of Ministers to the House, and the administration of the oath of office by the President to the Ministers. The *Madan Murari's* case (*supra*) decided, *inter alia*, that in making the choice of the Prime Minister the President has to act in his own discretion and naturally he must take various factors into consideration and the primary factors is his assessment as to who as Prime Minister and which body of Council of Ministers will enjoy the confidence of the Parliament in terms of Article 75(3). But the President is not fettered in his choice except by his own assessment. Further, the Court could not sit in judgment on the political assessment of the President. Article 75(1) of the Constitution of India provides that the Prime Minister shall be appointed by the President and the other ministers shall be appointed by the President on the advice of the Prime Minister. The corresponding provision in respect of the appointment of the Chief Minister of a State is contained in Article 164(1) which contains a proviso which is not relevant here, and which states:

> "164(1) the Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister and the Ministers shall hold office during the pleasure of the Governor."

It is thus apparent that the constitutional provisions in India corresponding to those in Article 6(3) of the State Constitution are not identical. For the purposes of these proceedings, I need not dwell upon the differences. Suffice it to say that the issues here are not concerned with whether the Head of State, in appointing the Chief Minister, had exercised his discretion properly, lawfully and constitutionally or what factors he took or did not take, into consideration when he made the appointment. As stated, the issue as to appointment relates to the question whether an appointment had been lawfully made. Hence, I am of the view that the decision in the *Madan Murari's* case *(supra)* has no application here.

The next Indian case cited is that of *Dinesh Chandra Pande* v. *Chaudhury Charan Singh & Ors.*[9] Part of headnote (A) reads:

> "Political questions are unjusticiable by Courts. The main reason is that legitimate use of political power is generally non-justiciable since it has political sanction which is sufficient in view of the separation of powers between the executive, the legislature and the judiciary in the Constitution. *But when it is alleged that political power has not been used in accordance with the Constitution or the law,*

the Courts have to examine if the issues are legal or political and if the latter if they are justiciable or not ... The Courts will not shun to decide seemingly political questions when the Constitution or a statute has to be interpreted to answer them."

Part of paragraphs 8 and 9 of the judgment of Deshpande C.J. reads:

"8. ... The doctrine of which we treat is one of political questions, not one of political cases. The Courts cannot reject as "no law-suit" a *bona fide* controversy as to whether some action denominated "political" exceeds constitutional authority.

9. Our Supreme Court has, however, had to decide seemingly political questions since the Constitution or a statute had to be interpreted to answer them, ordinarily a duty which Courts will not shun...."

I have reached the conclusion that the main issues involved in this action are legal and constitutional in nature, and consideration of legal principles and the interpretation of the Federal and State Constitutions are concerned. Hence, the decision in the *Dinesh Chandra Pande's* case, in my view, is of no assistance to the defendants.

Reference has been made in the course of argument to the letter dated May 30, 1985, addressed to the Head of State by the majority of the members of the LA, expressing support to the 2nd defendant as the Chief Minister [see Fols. 39 to 44 of Agreed Bundle (A.B.)]. In my view, this has no bearing on the issues to be decided in these proceedings. In any event, that letter was dated some time after the date of the disputed appointment concerned in this action.

The 3rd Indian case cited is that of *Jogendra Nath Hazarika* v. *State of Assam.*[10] Part of headnote (A) reads:

".... It is triflingly easy to raise questions touching one or the other provisions of the Constitution in every writ application and to contend that they are controversial questions relating to construction of Constitutional provisions and no Rule should be issued. The real test is whether an arguable issue has been raised by the petitioner."

That case was concerned with *inter alia* construction of Article 226 of the Constitution of India relating to the jurisdiction of the High Court to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. However, even assuming that the case cited has any relevance, I have held that in this action, the main issues are not inarguable ones. Part of headnote (C) states:

".... The repository of power to appoint Chief Minister and the Council of Ministers or to withdraw the pleasure contemplated under Article 164(1) and/or dismissal of the Ministry are exclusive pleasure-cum-discretion of the Governor. There is no limitation or condition of the unfettered pleasure prescribed in Article 164(1) .... There is no manner or method of withdrawal of his pleasure. There is nothing that it should be published in the official gazette."

I need comment no further on the difference in wording in Article 164(1) of the Indian Constitution and Article 6(3) of the State Constitution. Further, there is nothing in the State Constitution corresponding to what was provided in Article 163(2) of the Indian Constitution which reads:

"163(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion."

In my view, because of the difference in the reliefs sought in the *Jogendra Nath Hazarika's* case (*supra*) and the differences in the issues involved and the relevant constitutional provisions, I find that the decision in that case has no application here.

I need hardly reiterate that the second factor involved in the reliefs, particularly reliefs (a) and (b), sought by the plaintiff, that is, whether, assuming that it is within the power of the Court to make the declaratory orders and injunction sought, such reliefs should be granted, is, in my view, a matter that falls to be considered at the trial, and not at this stage of the proceedings.

In the result, I find that the third ground of objection fails.

I shall deal with the fourth and sixth grounds of objection together. The fourth ground is that the appointment of the Chief Minister is for the Yang di-Pertuan Negeri and subsequent to such appointment, the position of the Chief Minister is a privilege of the LA, and this privilege has been exercised by the LA by a vote of confidence on May 30, 1985. Subsequent to that, on August 3, 1985, matters in relation to the appointment of the Chief Minister had been decided by the LA, and therefore the Court should take cognizance of these and decline jurisdiction as a matter of principle.

The sixth ground is that the principle of parliamentary democracy enshrined in the Federal and Sabah State Constitutions is based on the separation of powers and therefore this Court should

avoid any enquiry directly or indirectly which might lead to a conflict with the LA.

I have previously commented on the resolution of the LA dated August 3, 1985.

On the fourth ground, it was contended that the right to be Chief Minister is a political right and that the ultimate judges are the elected representatives in the LA. In this connection, with respect, in my view, while it may be true that, although appointed by the Head of State, whether a Chief Minister can continue to be such would ultimately depend on whether he commands the confidence of the members of the LA – and, in this respect, there is nothing, including the State Constitution and the Legislative Assembly (Privileges, Immunities and Powers) Enactment 1963, to exclude nominated members – it is too wide a proposition to state that the right to be a Chief Minister is a political right, since, by virtue of his appointment by the Head of State, he has a legal right to be the Chief Minister until that right is terminated by an adverse decision of the majority of the members of the LA.

The case of *Bradlaugh* v. *Gossett*[11] was cited in support of the sixth ground. The headnote reads:

"The House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its internal procedure only. What is said or done within its walls cannot be inquired into in a Court of law.

A resolution of the House of Commons cannot change the law of the land. But a Court of Law has no right to inquire into the propriety of a resolution of the House restraining a member from doing within the walls of the House itself something which by the general law of the land he had a right to do, *viz*, take the oath prescribed by the Parliamentary Oaths Act, 1866 (29 Vict. c. 19).

An action will not lie against the Serjeant-at-Arms of the House of Commons for excluding a member from the House in obedience to a resolution of the House directing him to do so; nor will the Court grant an injunction to restrain that officer from using necessary force to carry out the order of the House.

The plaintiff, having been returned as member for the borough of N., required the Speaker of the House of Commons to call him to the table for the purpose of taking the oath required by 20 Vict. c. 19. In consequence of something which has transpired on a former occasion the Speaker declined to do so: and the House, upon motion, resolved 'that the Serjeant-at-Arms do exclude Mr B (the plaintiff) from the House until he shall engage not further to disturb the proceedings of the House.'

In an action against the Serjeant-at-Arms praying for an injunction to restrain him from carrying out this resolution:

Held, that, this being a matter relating to the internal management of the procedure of the House of Commons, the Court of Queen's Bench had no power to interfere.

Burdett v. *Abbott (14 East, 148)*, and *Stockdale* v. *Hansard (9 Ad. & E. 1)* commented upon and approved."

The following passage appears in the judgment of Stephen J. (at page 278):

"... I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its own internal proceedings, ..."

However, in the same judgment, a distinction was drawn between a right to be exercised within the House, and rights to be exercised out of and independently of the House. Thus, at page 282, the same judgment states (at para 1):

"We should have said that, for the purpose of determining on a right to be exercised within the House itself, and in particular the right of sitting and voting, the House and the House only could interpret the statute; but that, as regarded rights to be exercised out of and independently of the House, such as the right of suing for a penalty for having sat and voted, the statute must be interpreted by this Court independently of the House."

Later, in the same judgment, the following passage appears (at page 286, para 1):

"Those which are to be exercised out of Parliament are under the protection of this Court, which, as has been shewn in many cases, will apply proper remedies if they are in any way invaded, and will in so doing be bound, not by resolutions of either House of Parliament, but by its own judgment as to the law of the land, of which the privileges of Parliament form a part. Others must be exercised, if at all, within the walls of the House of Commons; and it seems to me that, from the nature of the case, such rights must be dependent upon the resolutions of the House."

Hence, a distinction should be drawn between the legal right to be Chief Minister outside the LA, after appointment by the Head of State, and the rights enjoyed or exercised by a Chief Minister within the LA.

The case of *The King* v. *Sir R.F. Graham-Campbell & Ors.*[12] was also cited. The headnote states:

"The House of Commons has the privilege of regulating its own internal affairs and procedure, including the sale, within the precincts of the House, of intoxicating liquor without a licence, through its employees in the Refreshment Department of the House.

The applicant applied in the police Court for summonses against certain members of the Kitchen Committee of the

House of Commons and the manager of the Refreshment Department of the House on the ground that they had on two occasions unlawfully sold by retail intoxicating liquor for the sale of which they did not hold a justices' licence as required by section 65 of the Licensing (Consolidation) Act 1910. The magistrate held that, assuming that there had been a sale of liquor without a licence, his jurisdiction was excluded by the privileges of the House and he declined jurisdiction.

Rules nisi having been obtained by the applicant for orders in the nature of mandamus calling on the magistrate, the members of the Kitchen Committee affected and the manager of the Refreshment Department to show cause why the magistrate should not proceed to hear and determine the applications for the summonses:

Held, that in the sale of liquor in the precincts of the House without a licence, the House was acting, through its Kitchen Committee and its employee, the manager of the Refreshment Department, in a matter which fell within the scope of the internal affairs of the House and, therefore, within the privileges of the House so that no Court of law had jurisdiction to interfere."

It was emphasized that this case is an illustration of how wide the privileges of the House are (see page 597, last para, and page 598, 2nd para). In this connection, it is to be noted that unless otherwise expressly provided, the LA and members thereof respectively enjoy the same privileges and immunities and powers as are enjoyed by the House of Commons and the members thereof (see section 6(1) of the Legislative Assembly (Privileges, Immunities and Powers) Enactment, 1963).

However, it should be noted that the decisions in the preceding two cases mentioned are confined to matters of internal management of the procedure of the House and the privilege of regulating its own internal affairs, and whether certain acts fell within the scope of such matters. Here, while one of the main issues relates to appointment of the Chief Minister, the right of the LA to pass the resolutions of May 30, 1985 and August 3, 1985 respectively is not being questioned. In this connection, it is to be observed that, while Standing Order 21(1)(g) of the Standing Orders of the LA prohibits the asking of any question on any matter that is *sub judice*, there is no similar provision in the Standing Orders in relation to the moving and passing of resolutions. Be that as it may, the relevant point to consider is whether, in the absence of any challenge, while it may be within the privileges of the LA to pass the resolutions of May 30, 1985 and August 3, 1985 respectively, they are binding on the Courts. In my view, for the purposes of these proceedings, in matters falling within the province of the Courts to decide, any resolutions passed in the LA on the same matters do not bind the Courts. It would be a startling and unacceptable situation if the position were otherwise, as is apparent. To take a simple illustration, if this proposition is not correct, it would mean in effect that the LA may encroach on the province of the Courts and take over their functions. The falsity of such a converse proposition is self-evident.

In my view the cases of *Republic of Italy* v. *Hambros Bank*[13] and *Howard* v. *Pickford Tool Co. Ltd.*[14] are of no assistance since the one confirms the principle that declaratory orders may be made by the Court only if the subject-matter of litigation is cognizable or justiciable in the Court; and the other decided that the jurisdiction conferred on the Court by Order 25, rule 5 (now Order 15, rule 16) should not be used to answer academic questions. Neither situation exists here.

Paras (b) and (c) of the headnote in the case of *C. Shrikishen* v. *State of Hyderabad*[15] read:

"(b) ..... There is no jurisdiction in the High Court to issue any writs against a Legislature or Parliament or the Speaker or any officer of these Assemblies. And further, neither a Writ of Prohibition nor a Writ of Certiorari nor a Writ of Mandamus will lie to restrain the State Legislature or Parliament from enacting any legislation even if it is ultra vires their powers.

A Court has no general or roving superintendence over an undefined field, nor is it its function to declare void or directly annul a law immediately it is promulgated unless its interpretative function is sought by any person or party who challenges that law as having infringed his rights on the ground of its being ultra vires of the powers of the legislative body. [1928] 1 K.B. 411. Rel. on.

(c) ... A Speaker of Parliament or Legislature or a Chairman of the Rajya Sabba are officers within the meaning of Article 122 or 212. Ministers of the Government whether of the Centre or of States are also members respectively of Parliament or Legislature; as such the courts cannot interfere with them in the part they play in the proceedings or business of the Assemblies nor can they interfere with their privileges, as the rights of any of them to introduce any Bill in their respective Assemblies are rights and privileges of those members whether as members or as Ministers. There is an inherent right in the Legislatures to conduct their affairs without any interference from any outside body."

However, as already expressed, there is no issue here relating to any challenge made to the power, right or privilege of the LA to conduct its business or affairs, including the passing of laws and the introduction and passing of resolutions.

Para (f) of the headnote in the case of *Har Sharan* v. *Chandra Bhan Gupta & Ors.*[16] states:

"(f) ..... Constitution of India, Article 226 – Principle of judicial review – Court will not comment on executive acts which do not violate the law or the Constitution.

The executive and the judiciary are independent of each other within their respective spheres. Each is conversant with the peculiar circumstances within its own sphere and his special knowledge of complicated questions which is denied to the other. Each must have the fullest discretion in the discharge of its duties. The acts of the executive are not open to review by the judiciary as long as there is no violation of the law or the Constitution. It follows that the Court should not ordinarily comment on any act of the executive unless the act is such that it is likely to promote disrespect for the law. The Court must extend the same courtesy to the other branches of government, which it receives from them and refrain from making uncalled for comments on the wisdom of the acts of the ministers of government."

In this connection, it should be borne in mind that this action does not involve a review of the acts of the executive, but concerns mainly issues involving consideration as to whether, constitutionally and in law, the plaintiff was appointed Chief Minister, and legal issues regarding alleged misrepresentation, fraud, duress and conspiracy against the Plaintiff. The issue on dismissal would involve consideration as to whether the State Constitution has been violated. Hence, in my view, the *Har Sharan Varma's* case (*supra*) has no application here. However, paras 26 and 27 of the judgment of S.S. Dhavan J. in that case may be worthy of note. They read as follows:

"(26) The Court's jurisdiction does not extend to every kind of improper exercise of power conferred by the Constitution. Impropriety may be either legal or political in nature. In the former case the court will interfere, in the latter it cannot.

(27) The Constitution of parliamentary democracy has been compared to a floating iceberg, as it consists of parts which are written and visible and others which are unwritten and invisible but cannot be ignored without imperilling the democratic process itself. The written text of the Constitution which distributes the powers of government between its different branches and regulates the manner of its exercise is the visible part of the Constitution. If the provisions of the Constitution are violated, the courts can interfere. If for example, government pass a law infringing the fundamental rights of a citizen in violation of Article 13, or the State imposes a tax which it is not authorised to do, or the Governor nominates as member of the Council a person who is not a citizen of India, the remedy lies in the law Courts."

As to the quotation made by learned senior counsel for the defendants from *Zamir* on the Declaratory Judgment (1962) at page 42, relating to extra-legal issues, that is, issues that are not of a legal, but of a moral, social or political character, I have dealt with this aspect of the matter when considering the third ground of objection regarding the making of declaratory orders and injunctions.

Emphasis has been laid on the case of *Council of Civil Service Unions & Ors.* v. *Minister for the Civil Service*[17] and, in particular, to the view expressed in the judgments of Lords Scarman, Diplock and Roskill in that case that powers exercised directly under the prerogative are not by virtue of their prerogative source automatically immune from judicial review. If the subject-matter of a prerogative power is justiciable then the exercise of the power is open to judicial review in the same way as a statutory power. However (*per* Lord Roskill), prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and *the appointment of ministers* are not justificable or reviewable. In this connection, the first observation I would make is that, in my view, this action is not concerned with judicial review of the exercise of prerogative power. At the risk of repeating myself a main issue concerns the question as to whether the plaintiff has been legally appointed Chief Minister or not and if so, whether such an appointment is vitiated by conspirary, misrepresentation, fraud or duress; and further, another main issue is that relating to dismissal, although this issue is related to that of appointment. In any event, the opinion in the judgment of Lord Roskill was expressed *obiter*. Mention has been made that the power of appointment of the Head of State may possibly be described as a reserved power. However, having regard to the fact that the power of appointment is vested in the Head of State by the State Constitution, such power, in my view, may more properly be described as a constitutional power, although the State Constitution also states that such power is discretionary, subject to the two factors mentioned in Article 6(3) which the Head of State must take into consideration.

For the purposes of these proceedings, I do not propose to deal with the case of *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg & Tawi Sli*[3], as it concerns the question of dismissal.

It should be remembered that the appointment of the 2nd defendant as Chief Minister,

as such, is an issue in so far as it is related to the claim of the plaintiff that he had been validly appointed Chief Minister previously and that his purported dismissal is unconstitutional, null and void. If the plaintiff succeeds in his claim to reliefs (a) and (b), it necessarily follows that the appointment of the 2nd defendant as Chief Minister would be adversely affected, as it is common ground that there is no provision in the State Constitution for the appointment of two Chief Ministers. The plaintiff is also alleging breach of the State Constitution in the matter of what he claims to be his dismissal as Chief Minister. Considered in this light, I do not regard that the case of *R.K. Nokulsana Singh* v. *Kishang Keising*[18] assists the defendants. The Articles of the Indian Constitution concerned in that case are Articles 226 and 164, to which I have referred previously, with the observation that the provisions of the latter Article are not identical to the corresponding provisions in the State Constitution. Further, this is not a case involving the consideration whether the Chief Minister has been appointed according to the practice of parliamentary democracy. In a nutshell, the main dispute is: who is the lawful and rightful Chief Minister, involving issues of whether the plaintiff was lawfully dismissed.

The futility of the courts getting involved in cases having political flavour was stressed. In this connection, I would echo the view expressed by Tun Suffian, the former L.P., in his dissenting judgment in the case of *Dato Menteri Othman bin Baginda & Anor.* v. *Dato Ombi Syed Alwi bin Syed Idrus (supra)* where, at page 39, he stated:

"Whether or not the Undang has been validly elected is of course a delicate question, and a political question which is best solved by political means: but if the constitution, and law require, as I think they do, that the matter be resolved by the Court, then until the constitution has been suitably amended, the Court has no alternative but to embark on the task as best as it can ..."

Further, the Courts will not shun to decide seemingly political questions when the Constitution or a statute has to be interpreted to answer them [see the *Dinesh Chandra Pande's* case *(supra)*].

In support of the argument that the appointment of the Chief Minister is a matter of parliamentary privilege, it was contended that the position of the Chief Minister is so vital to political life that no LA can function without him. Hence, it is self-evident that it is a privilege given to the LA, subsequent to his appointment, to decide who carries on as Chief Minister and whether the appointment was right or wrong. The machinery of parliamentary democracy is such that the appointment must go back to the LA. In this connection, it is obvious that, under the State Constitution, the matter of "appointment" and that of "confidence of the LA" are separate and distinct: While it is for the Head of State to appoint the Chief Minister, with which function the LA is not constitutionally concerned, whether subsequently the appointee of the Head of State commands the confidence of the majority of the members of the LA, is for the members of the LA to decide. The matter of appointment, with which we are here concerned, is therefore, in my view, not a matter of parliamentary privilege, although subsequently, the LA has the final say as to whether the appointment is endorsed by the majority of the members thereof and whether the appointee should continue as Chief Minister.

We pride ourselves in adopting the system of Government based on parliamentary democracy, which is based on the principle of the separation of powers among the Legislature, the Judiciary and the Executive. So long as this vital principle is practised and maintained, as is being done, the proper functioning of Government is ensured.

In the premises, there is no question of the court declining jurisdiction or avoiding any enquiry directly or indirectly which might lead to a conflict with the LA.

This disposes of the 4th and 6th grounds of objection.

I come now to the 5th ground, which is that the jurisdiction of this court to decide on the issues raised is ousted as a result of the resolutions of May 30, 1985 and August 3, 1985 by Article 72 of the Federal Constitution.

Article 72(1) of the Federal Constitution stipulates that "The validity of any proceedings in the Legislative Assembly of any State shall not be questioned in any Court." It is pertinent to consider what the word "validity" implies here. As already noted, there is no challenge here on the passing of the two resolutions mentioned by the LA. If they concern matters relating to internal management or the internal affairs and procedure of the LA, then, on the authorities, the matters with which they are concerned are not justiciable and it does not fall within the jurisdiction of the Court to adjudicate upon them. Examples are the *Fan*

Yew Teng's case, the *Bradlaugh's* case and *Sir Graham-Campbell's* case. However, if they relate to matters falling within the sphere of the Courts, such as the main issues here, regarding which I have already dealt with, then obviously the jurisdiction of the court is not ousted by these resolutions. I think that I have given enough expression on the matter and need say no more. In my view, as was rightly pointed out by learned senior counsel for the plaintiff, most of the items in the resolution of August 3, 1985 concern issues which fall to be decided by the Court in this action, particularly items (i), (ii) and (iii), issues which, for the reasons already given, do not, in my view, fall within the jurisdiction of the LA to decide. As to the resolutions of May 30, 1985, if they are to be construed as having a similar effect, then the same situation applies.

In the premises, I rule that the resolutions of the LA dated May 30, 1985 and August 3, 1985 do not oust the jurisdiction of the Court to try his action.

The last and 7th ground, which I shall dispose of shortly, is that the issues raised in the Statement of Claim are now *ex post facto* and no longer issues that can be justiciable. This ground is related to the 5th, which has just been dealt with and in the light of my ruling on that ground, the conclusion on this ground is obvious. However, the cases of *Glasgow Navigation Co.*, v. *Iron Ore Company*[19] and *Tindall* v. *Wright*[20] were cited in support of this ground. The headnotes of these cases are short and they respectively state:

"Action dismissed when it appeared to the House to have been brought to try a hypothetical case. No costs."; and

"The court will not decide a point of law which has become academic, even though both parties are anxious to have it determined, and though it is a matter of public importance on which a Government Department desires the guidance of the Court with a view to introducing amending legislation if necessary."

For the reasons given in my ruling on the other grounds of objection, I rule on this ground that this action, in my opinion, does not appear to have been brought to try a hypothetical case; nor does it involve the court deciding a point of law which has become academic. That suffices to dispose of this ground of objection.

For the reasons given, therefore, I rule that the court has jurisdiction to try this action.

[*The defendants appealed to the Supreme Court.*]

A SUPREME COURT.

Ms. Josie D. Bosie (Deputy State Attorney-General, Sabah) for the 1st appellant.

Dominic Puthucheary (*Philip Koh* and *Joannes Golokin* with him) for the 2nd appellant.

B *Raymond Kidwell* Q.C. (*Sri Ram* and *Abdul Razak Rouse* with him) for the respondent.

Abdul Hamid C.J. (Malaya) (delivering oral Judgment of the Court): The respondent in these proceedings seeks, briefly put, declarations to establish the validity of his appointment as the Chief Minister of the State of Sabah and to the effect that the purported revocation of his appointment and the subsequent appointment of the 2nd appellant as Chief Minister are *ultra vires* and devoid of any effect. The appellants refute these claims and in their defence aver that the respondent's appointment as Chief Minister in the first instance was in fact procured by conspiracy, misrepresentation, fraud and duress and that the 1st appellant could in fact and in law revoke the appointment in the circumstances.

At the outset of the hearing before the High Court in Kota Kinabalu the appellants raised a preliminary point by taking objection to the jurisdiction of the court in respect of these proceedings on the basis that the issues raised were not justiciable. The hub of their contention, although diffused into a network of some seven grounds of objection, would appear to be that a purely political question was involved calling for a political solution and the matter was accordingly beyond the scope of judicial determination. The learned judge after hearing lengthy and extended argument dismissed the objection taken.

The central issues in this matter are the validity of the initial appointment of the respondent as the Chief Minister which itself has been called into question by the appellants themselves on the allegation that this was procured by conspiracy, misrepresentation, fraud and duress, the power of the 1st appellant to revoke this appointment and the consequential validity *vel non* of the appointment of the 2nd appellant as Chief Minister of the State. Now all this must certainly entail a delicate exercise in constitutional interpretation on a consideration of the background and attendant circumstances alleged and involved.

The appointment of the respondent in the first instance must be lawful and made in *bonam par-*

tem, and when this is impugned by the appellants themselves on the basis of the allegations we have adverted to, then this would surely require evidence and examination of the allegations made in order to determine the lawfulness of the initial appointment and whether the 1st appellant's judgment was in fact impaired as a result in exercising his discretion in making the appointment. The subsequent purported revocation of the appointment would also raise legal and constitutional issues attracting legal considerations. We are therefore of the view that justiciable issues do in fact arise for judicial determination and the matter falls within the jurisdiction of the Court for adjudication.

The mere fact that a litigant seeks the protection of a political right does not mean that it presents a political question. Whether a matter raises a political question; whether it has been committed by the Constitution to another branch of government is itself a matter for judicial determination because the Constitution has made the Courts the ultimate interpreter of the Constitution. The Courts accordingly cannot reject a *bona fide* controversy as to whether some action denominated 'political' exceeds constitutional authority.

We cannot see any substance whatsoever in the contention that a privilege of the State Legislative Assembly is involved in the matter before us or that the jurisdiction of the Court to decide the issues raised is ousted as a result of the resolutions of the Assembly passed on May 30 and August 3 respectively.

The issues here are the matter of the initial appointment of the respondent as Chief Minister, the subsequent purported revocation of that appointment and the consequential appointment of the 2nd appellant as Chief Minister by the 1st appellant. Motions of confidence or no confidence or whatever passed in the Legislative Assembly might be political ratification or rejection of the choice made but cannot, in our view, affect the primary issues of the appointment and revocation which are legal and justiciable questions clearly within the competence of judicial consideration and determination. The learned judge has dealt somewhat exhaustively with all the contentions raised on behalf of the appellants on the question of jurisdiction and we agree with the reasons he has given and his conclusion that the matters raised in the respondent's action are justiciable and not without the jurisdiction of the court for trial.

We accordingly dismiss this appeal with costs. The deposits lodged by way of security will be paid out to the respondent. The substantive proceedings can now proceed to a hearing and, we trust, with some expedition. We urge that counsel approach the trial court for an early date of hearing.

Appeal dismissed.

Solicitors: *Luping Koding Kurup Golokin Noor & Co.; Rayner & Co.*

M. ARULANDAN v. MALAYSIAN CO-OPERATIVE INSURANCE SOCIETY LTD.

[S.C. (Wan Suleiman, Seah & Wan Hamzah S.C.JJ.) June 25 & October 17, 1986]

[Kuala Lumpur — Supreme Court Civil Appeal No. 85 of 1985]

Co-operative Society — Disciplinary action against officer of co-operative society — Application to declare disciplinary action null and void — Appointment of Chief Executive officer — Dispute touching business of a registered society — Whether issue should be referred to Registrar-General of Co-operative Societies — Exhaustion of domestic remedies — Co-operative Societies Rules 1949, r.25(1) — Society's Bye-laws, Byelaw 37A — Co-operative Societies Act 1948 (Act 287), ss. 2 & 49(1) & (3)(c).

In this case the appellant was a member and an officer of the respondent society. Disciplinary proceedings were instituted against him and as a result his increment was barred. The appellant brought an application for a declaration that the purported disciplinary action against him was null and void and of no effect. He contended that the institution of the Board of Inquiry by the Chief Executive was null and void, as the society had no authority to appoint any person superior in status to the General Manager. He also contended that the lawfully constituted disciplinary authority of the society was the General Manager. The respondent applied for an order to strike out the appellant's claim on the ground that the dispute should have been referred to the Registrar-General of Co-operative Societies pursuant to section 49(1) of the Co-operative Societies Act. The learned trial judge struck out the application of the appellant and he appealed.

Held by a majority (Seah S.C.J. dissenting): (1) the Board of the Co-operative Society had power to appoint the Chief Executive under the Co-operative Societies Rules 1949. The question whether the appointment of the Chief Executive was null and void for lack of jurisdiction is a question for the court to decide as it involves the consideration of the statutory provisions;

(2) in the present case the question does not arise whether the Chief Executive's actions were illegal or